No. 13043

IN THE

United States

Court of Appeals

for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer, Montana Induction Center, Butte, Montana,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

Filed ....., 1952

FILED

..... Clerk

FEB 15 1952

APPEARANCES:

JERRY J. O'CONNELL,
305 Barber-Lydiard Building,
Great Falls, Montana.
For Petitioner and Appellant.

DALTON PIERSON,
United States Attorney for the District of Montana,
Federal Building,
Butte, Montana,

R. LEWIS BROWN, Jr.
Asst. United States Attorney for the District of Montana,
Federal Building,
Butte, Montana,
For Respondent and Appellee.

No. 13043

IN THE

United States

Court of Appeals

for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer, Montana Induction Center, Butte, Montana,

Appellee.

APPELLANT'S REPLY BRIEF

It is most unfortunate that Appellee's Brief, in more than one-half of its entire contents, is devoted to an unwarranted personal attack upon counsel for the Appellant. It seems apparent that counsel for the Appellee seeks to becloud the real issues and the merits of this appeal, and the justice which Appellant seeks, behind a smokescreen of intemperate vituperation. Appellant is sure that this Court will not be deceived by this shaggy bearded device of "trying the

Attorney for the other side," and resorting to the time-worn and oft denounced **argumentum ad hominem.** It is unfortunate, too, that so much of Appellee's Brief is dehors the record, and based upon his Counsel's testimony of oral conversations held between the lower Court and Appellant's counsel, when the recollection and the understanding of such conversations are subject to the human frailty of faulty memory on both sides.

For the record, Counsel for the Appellant has a different recollection and understanding of the conferences which were held with the lower Court, but is more than willing to concede that in his inexperience he may have misunderstood the lower Court's suggestions, but such misunderstanding, if any was not "fraudulent," "scheming," "fraud and trick," or "misrepresentation, so glibly hurled in Appellee's brief.

Appellant submits that this appeal and this forum is not the proper place or time for Counsel for the Appellee to make the unwarranted personal attack to which they stoop to achieve a victory. Certainly their outcry comes too late. Why didn't counsel for the Appellee raise this issue at the time of the hearing in the lower Court, when not a single word was said? (R. 22, 23, 24, 25, 26.) Why wasn't it raised on the Motion to Quash the Stay of Execution, which was not even set down for hearing? Why wasn't it raised in Appellee's Motion to Dismiss this appeal, which motion this Court properly denied? Why wasn't it

raised in a Motion to correct the record at any time in the several months since the record was designated on appeal? Why wasn't the matter raised by calling in Counsel for the Appellant in the lower Court, and dealing with it properly and at the proper time and in the proper place, instead of denying to Appellant his rights under the law of the land? Why now does Counsel seek to compound injustice, instead of permitting this Court to pass upon the real issues and the merits of this appeal? Why penalize Appellant further for fancied grievances concerning his Counsel?

Counsel for the Appellant is sure that this Court will not waste its precious time over petty personalities, but will decide the appeal on the merits of the case, and render justice to the Appellant, which has heretofore been denied. Appellant will not belabor the Court further, but on the law in the case, will rely upon his opening brief and his oral argument on the appeal before this court.

Respectfully submitted,

JERRY J. O'CONNELL,
Attorney for the Appellant
305 Barber-Lydiard Bldg.
Great Falls, Montana

No. 13,043

IN THE

United States

Court of Appeals

for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer, Montana Induction Center, Butte, Montana,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

PETITION FOR REHEARING

Filed ....., 1952

....., Clerk

No. 13,043

IN THE

United States

Court of Appeals

for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer, Montana Induction Center, Butte, Montana,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

PETITION FOR REHEARING

The appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represents to the court as follows:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves

solely to that feature of the decision wherein we believe the court may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this court that it erred in its determination that "Actually, if appellant was ever in custody he was released on June 15, 1951, **before** the writ was served" (emphasis supplied). This finding and opinion ignore the whole question of hearing and due process raised by the appellant in the first four specifications of his opening brief, which are the specifications which actually go to the heart of the case and which were so ably and cogently pointed out by Judge Mathews on the oral argument of the case. The court's opinion actually accepts the statements of the appellee and his attorney in the abortive hearing allegedly held by the lower court. The only way that this court could find that the appellant was released before the writ was served is to accept the appellee's testimony that the former was released, which statements were made in what was no more than an oral discussion held between the lower court and the appellee in the absence of the appellant and his counsel and in violation of the appellee's duty to produce the body of the appellant as ordered by the writ which issued, or at least to show that the appellant was not in his custody. Appellee has not made any return to the appellant's petition and the allegations of restraint and custody therein set forth are still to this day uncontroverted and undenied as Judge Mathews

pointed out in the oral argument. The only way it can be determined, under due process and the provisions of the statute, whether the appellant was released before the writ was served is to send this case back for proper hearing, under the law, by the lower court. With respect to this court's opinion that the appellant is not now in custody and has not been in custody since June 15, 1951, is to again accept the statements made in the purported hearing held by the lower court and to ignore the record which shows that the appellant is not now in custody only by virtue of his release on his recognizance by District Judge Charles N. Pray. Appellant feels that the court clearly erred in failing to send this case back for proper hearing before the lower court.

For the foregoing reasons this Petition for Rehearing should be granted.

Respectfully submitted,

JERRY J. O'CONNELL,
Attorney for the Appellant

CERTIFICATE OF COUNSEL

STATE OF MONTANA,)
COUNTY OF CASCADE) ss.

JERRY J. O'CONNELL, being first duly sworn, on oath certifies and says:

That he is the attorney for the appellant in this cause; that he makes this certificate in compliance with Rule 25 of the rules of this court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

JERRY J. O'CONNELL,

Subscribed and sworn to before me at Great Falls, Montana, this 10th day of June, 1952.

VIOLA A. ANDERSON
Notary Public in and for the
State of Montana
Residing at Great Falls, Montana
My Commission Expires Oct. 19, 1954